Supreme Court, U.S.
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No. 99-1221

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

VICKI AMMERMAN, Guardian of
PAMELA AMMERMAN, and LANA AMMERMAN,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana

REPLY BRIEF FOR PETITIONER

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Respondents' 30-page opposition barely discusses—and seriously misperceives—the actual questions presented, seeks to distract the Court with overblown rhetoric and irrelevant allegations, misstates the record, and misunderstands this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The bulk of respondents' brief is nothing other than an oft-repeated amalgamation of overheated jury arguments based on a one-sided recitation of the purported "facts." *See* Opp. 3-7, 15-17. While this approach successfully fomented the jury in this case into excess, it is entirely irrelevant to the two questions presented. Respondents have manifestly failed to rebut Ford's demonstration that lower federal and state courts have reached directly conflicted and confused results with respect to those important and recurring questions. This Court's review is necessary to resolve the conflicts.

A. The "Wealth" Question Warrants This Court's Review And Is Squarely Presented By This Case

1. Respondents do not, because they cannot, seriously dispute that the lower courts are in conflict over Question 1 regarding what role a defendant's wealth should play in scrutinizing punitive damages for excessiveness under *BMW*. *See* Pet. 11-16. Rather, respondents themselves concede that "the lower courts may differ in the emphasis they place on the defendant's financial status," and the most that they can muster in response is the assertion that a "majority" of courts decide the issue in the way that respondents deem correct. But, without so much as a single citation, respondents write off these clear conflicts as merely a quirk of federalism produced by "historical differences embodied in each state's common law." Opp. 24. As Ford has demonstrated, however, many courts, like the courts below here, are not confining their analysis of wealth to the state-law excessiveness inquiry, but rather are invoking the defendant's wealth as part and parcel of the *federal constitutional* analysis as a means to trump the three *BMW* guideposts and to uphold

punishments that otherwise would be deemed excessive under the Due Process Clause. Pet. 11-15.[1] Such decisions flatly contradict numerous decisions from other courts that have squarely rejected wealth as part of the *BMW* inquiry. *Id.* at 16.

Nor can respondents escape the *BMW* Court's rejection of the plaintiff's argument in that case that the defendant's significant wealth saved the $2 million punishment from a finding of excessiveness under the Due Process Clause. *See* Pet. 9-11. Although respondents argue that state courts have long considered the defendant's wealth in analyzing punitive damage awards under *state* law and that this Court has not held that state courts are constitutionally barred from doing so (Opp. 20-21), that begs the question whether the defendant's wealth is or should be part of the *federal* constitutional calculus. The *BMW* Court, by refusing to include wealth as a guidepost, and by declaring, "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business," 517 U.S. at 585, rejected wealth as a due process factor. But many lower courts—like respondents—have read wealth back into the due process equation, creating intolerable conflict and uncertainty and defeating any possibil-

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[1] Respondents repeatedly and inexplicably state that Ford is not challenging the $13.8 million punitive damage award as excessive under *BMW*. *E.g.*, Opp. 21. But Ford is, of course, challenging the punitive damage award here as grossly excessive under the three *BMW* guideposts, as it made crystal clear in its petition. *E.g.*, Pet. 2 (the court below allowed Ford's wealth "to determine the outcome" of its *BMW* analysis and "defeated the *BMW* due process 'guideposts' for determining constitutional excessiveness by according an overpowering effect to Ford's financial status"). The Indiana Court of Appeals' inappropriate reliance on Ford's financial status caused it to affirm an award that is constitutionally excessive under all three *BMW* guideposts and cannot be justified by any legitimate state interest in punishment or deterrence.

ity that defendants will "receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574.

2. Respondents' main argument against certiorari is that "Ford's wealth is not, and never has been, a component of the calculus for punitive damages" in this case. Opp. 9; *id.* at 1 ("wealth forms no part of the remitted punitive award"). But that assertion is simply false.

a. From start to finish, respondents argued below that Ford's wealth justified a massive punishment. In their transfer petition to the Indiana Supreme Court, respondents explicitly argued that "[t]he amount of money necessary to punish and deter a multinational corporate conglomerate *must* take into account its wealth." S.L. 1 at 2. (Ammermans Brief Supporting Transfer) (emphasis added).[2] Respondents further argued:

> It was uncontroverted that Ford earned 50 million dollars for every hour of sales; 40 million dollars in weekly sales in Indiana alone, had yearly profits of five billion, eight hundred million dollars, and its assets totaled over two hundred billion dollars. *On this evidence, the jury determined that 58 million dollars was an appropriate punishment for this defendant.* The penalty constituted slightly more than one hour of sales and less than six one hundredths of a percent (.006%) of Ford's total assets. Under established Indian law, this verdict was not excessive. *See Dow Chemical v. St. Vincent Hospital and Health Care Center, Inc.*, 553 N.E.2d 144 (Ind. Ct. App. 1990) (punitive award of .035% of Dow's total assets not excessive).

Id. (emphasis added). Respondents had made the virtually identical arguments to the court of appeals. *See* S.L. 2 at 60 (Ammermans Reply Brief); S.L. 3 at 14 (Ammermans Brief Opposing Rehearing) (Ford had "ample notice" of "severe sanctions" because a prior Indiana case had upheld punitive award equal to 1% of company's net worth; given Ford's

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[2] Twelve copies of all documents with "S.L." cites have been lodged with the Office of the Clerk of the Court.

income, Ford "could have been assessed $219 million" in punitives under that "1% toll").

Respondents' counsel had invited reliance on Ford's worldwide wealth through his repeated inflammatory and prejudicial arguments to the jury based on Ford's economic status. In proposing punitive damages figures to the jury, respondents' counsel explained that "I want you to understand that when I mention these numbers to you that there are several things that are important. *The first is the wealth of the defendant.*" R. 11453. He never got to the second. *See Id.* at 11453-57. Rather, he stressed that Ford's total sales for 1994 was $107,000,000, which he characterized as being "Two Billion Dollars ($2,000,000,000) a week. In a 40-hour week, their sales were Fifty Million Dollars ($50,000,000) an hour." *Id.* at 11454-55. He then suggested that the jury take away at least one hour of Ford's profits, arguing that "[i]f it was a food service worker, would you hesitate to award Five Dollars and Fifty Cents ($5.50) for one hour?" *Id.* at 11455. As respondents later argued to the Indiana Supreme Court, such arguments clearly had their intended effect.[3]

b. It is equally clear that the courts below based their evaluation of the punitive damage award on Ford's overall wealth. Based on respondents' own arguments, the trial court, for example, rejected Ford's *BMW*-based arguments and held—largely because of Ford's wealth—that even the original $58 million punitive damage verdict was not constitutionally excessive: "Ford's net worth is about $219 Billion [sic] and its gross income in 1994 was, roughly, $50 Million per hour. The punitive damages awarded represented only 1% of Ford's 1994 profits. This Court cannot say that within

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[3] Respondents' assertion that Ford failed to object to the *admission of evidence* regarding Ford's wealth misses the point. Ford is not arguing here that the admission of such evidence violated due process, but that the courts below misinterpreted *BMW* by *using* the evidence of Ford's wealth to uphold an otherwise unconstitutional punishment.

the context of Ford's enormous wealth, its profit of $2.2 Billion from the sale of Bronco II, and the damages sustained that 'at first blush' or otherwise, these damages are excessive." Pet. App. 62a.

To be sure, the trial court remitted the award to $13.8 million because it concluded that, at respondents' counsel's invitation, the jury had violated the rule against extraterritorial punishment by calculating the award by multiplying $83.00—the amount respondents alleged Ford had saved on each vehicle by not complying with their proposed stability index standard—by the total number of Bronco IIs Ford actually sold throughout the entire world (approximately 700,000). Pet. App. 34a, 37a. Thus, if the jury's verdict were properly limited to the Bronco IIs sold within the State of Indiana, the jury's calculus would result in a maximum punitive award of *$950,516* ($83 multiplied by 11,452).

The trial court, however, based the $13.8 million remitted award on what it believed it would have cost Ford to retool the production lines for *every Bronco II sold anywhere in the world* to comply with respondents' proposed standard—an amount just as unconstitutionally based on Ford's lawful conduct in other States as the jury's original verdict. The court's reliance on Ford's worldwide wealth as a factor in upholding the punishment likewise amounted to a punitive tax based on Ford's lawful activities outside the State of Indiana. *Cf. Hunt-Wesson, Inc. v. Franchise Tax Bd.*, U.S. No. 98-2043 (Feb. 22, 2000).

The court of appeals rejected Ford's excessiveness and extraterritoriality challenges to the remitted award, and upheld the award of $13.8 million in punitive damages, expressly relying on Ford's worldwide wealth. Again, mirroring respondents' arguments, the court of appeals explained that Ford had constitutionally adequate notice that it could be subjected to such a severe punishment in Indiana because "[w]hen reviewing an award of punitive damages we consider two primary factors. First, the nature of the tort and the extent of the actual damages sustained should be considered. *Second, the economic wealth of the defendant should be considered.*" Pet. App. 42a-43a (emphasis added). In other

words, the court established a principle that will swallow the *BMW* fair notice principle whole: Wealthy companies are always on notice that they can be subjected to severe punishments in jurisdictions that allow courts to invoke the company's wealth as a basis for upholding the punishment. This approach, although clearly inconsistent with *BMW*, has been adopted by numerous other courts. *See, e.g.*, *Anderson v. General Motors Corp.*, No. BC116926, slip op. at 2-3 (Cal. Super. Ct., Los Angeles County) (Aug. 26, 1999) (upholding $1.09 *billion* in punitive damages under *BMW*, reasoning that "defendant possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action").[4]

Having held that Indiana law mandated that it "should" rely on Ford's overall wealth, the court of appeals did just that in deciding that Ford had received constitutionally required notice for purposes of *BMW*. Pet. App 44a (explaining that it was "especially true" that Ford had notice of the potential size of the punishment "given that Ford's economic wealth . . . is a factor to be considered in assessing punitive damages"); *see also id.* (citing *Dow Chemical*, 553 N.E.2d at 144, 151 (upholding punitive award based on company's "phenomenal wealth")).[5]

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[4] Respondents rely on earlier Indiana decisions with higher punitive to compensatory ratios than the 18:1 and 2:1 ratios here—but vastly lower punitive damages awards—to argue Ford had adequate notice. But the *BMW* Court did not hesitate to hold that the punitive award in that case violated due process, despite the fact that earlier Alabama decisions had upheld awards that equaled or exceeded the 500:1 ratio present in *BMW*. *E.g.*, *Health-America v. Menton*, 551 So.2d 235 (Ala. 1989) (746:1); *USA Principal Fin. Group v. Thomas*, 585 So.2d 816 (Ala. 1991) (750:1).

[5] Equally wrong is respondents' argument that Ford failed to preserve this question below. Respondents do not dispute that Ford raised *BMW* excessiveness challenges to the $13.8 million punitive damage award in both the Indiana Court of Appeals and Indiana Supreme Court; having raised its federal due process claim in

[Footnote continued on next page]

3. Respondents' attempt to wish away the troubling questions presented by the decision below by insisting that it was the alleged reprehensibility of Ford's conduct that drove the punitive damage award—and nothing else. *E.g.*, Opp. 9-12. As discussed above, however, both courts below explicitly allowed Ford's wealth to tip the scales of their constitutional analysis under *BMW*; in any event, respondents overargue the reprehensibility point, steadfastly refusing to let the record get in the way.

For instance, while it is true that the jury was instructed that it could not award punitive damages unless it found that Ford exhibited "reckless disregard for[] the health and safety of its consumers" (Opp. 16), the jury's conclusion on this score is manifestly inconsistent with the specific findings of the National Highway Traffic Safety Administration ("NHTSA") that the Bronco II's stability characteristics do not distinguish it from other sport-utility vehicles on the market, and that there is no basis to conclude that the *entire class* of sport-utility vehicles on the road is defective with respect to motor vehicle safety. R. 10193. The trial court's condemnation of Ford for failing to increase the Bronco II's so-called "stability index" is also at odds with the views of the federal government, which—throughout the period in which Ford manufactured and sold Bronco IIs—rejected any design rule based on the "stability index," in part on the grounds that adherence to such a design rule "could have a net adverse effect on safety." 52 Fed. Reg. 49033, 49034 (1987). Respondents' assertion that Ford withheld crucial

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[Footnote continued from previous page]
the courts below, Ford is entitled to raise any and all arguments in support of that claim in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). In any event, Ford's opening brief to the Indiana Court of Appeals contained an entire section dedicated to this very issue. S.L. 4 at 76-77 (Ford Appellant Brief).

records from NHTSA that would have changed the agency's opinion is specious. As respondents are aware, the federal government has conclusively rejected this accusation—and has reaffirmed its conclusions about the Bronco II with the benefit of all of the documents plaintiffs find significant. *See* 64 Fed. Reg. 27343, 27353 (1999) ("consistent with its findings [in 1990], [NHTSA's] analysis of more recent data indicates that the rollover propensity of the Bronco II does not stand out from that of other peer [sport-utility vehicles].").

Respondents and their experts would have had Ford's engineers draw the design lines differently—making the vehicle wider and shorter—in disregard of NHTSA's admonition that blind adherence to a vehicle's stability index could "have a net adverse effect on safety." 52 Fed. Reg. at 49034. But the mere fact that Ford's engineers can retrospectively be second-guessed by respondents' experts does not establish a high degree of reprehensibility under *BMW*. Just as BMW was required to draw careful lines in distinguishing "between presumptively minor [pre-sale] damage [to new vehicles] and damage requiring disclosure to purchasers" (517 U.S. at 579), Ford's engineers were required to mediate the Bronco II's function as an off-road sport-utility model with the need for optimum on-road stability—all with the goal of ensuring that the vehicle that was finally released to consumers was not "*unreasonably* dangerous." R. 11886 (emphasis added).

Of course, determining the "reasonableness" of the design under these circumstances required careful line-drawing and the exercise of professional and scientific judgment. Nearly all juries around the country that have reviewed the matter have agreed that Ford's Bronco II engineers acted responsibly, and have either specifically found the Bronco II to be defect-free or have otherwise returned a verdict for Ford.[6]

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[6] *See* S.L. 4 at 66 n.19 (Ford Appellant Brief) (six juries outside Indiana had either explicitly found the Bronco II non-defective or returned a verdict for Ford., whereas only two juries had returned a verdict for plaintiffs in Bronco II rollover actions, and one of those had expressly found the Bronco II to be defect-free).

Nevertheless, even assuming that a jury could properly impose compensatory liability based on Ford's failure to adopt respondents' stability index design standard, the line-drawing conducted by Ford's engineers plainly does not "establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580. Respondents' argument to the contrary deprives the reprehensibility prong of the *BMW* analysis of all meaning.

B. This Court's Review Is Also Necessary To Clarify The Comparable Penalty Element Of *BMW*

Respondents' opposition to certiorari on Question 2 regarding *BMW's* comparable penalty guidepost engages in the same sort of analysis that numerous lowers courts now employ to evade that factor and uphold huge punishments. As Ford demonstrated (Pet. 21-24), lower courts have reached directly conflicting decisions over application of this guidepost, with some, like the Indiana Court of Appeals, holding that it is "not applicable" because there is no civil or criminal statutory penalty governing the specific conduct at issue, even though there are generally applicable fines that encompass that conduct (Pet. App. 42a); while other courts have taken the opposite approach, relying in part on excessiveness in relation to general criminal fines to strike down punitive damage verdicts. Respondents basically concede this conflict, and are left to argue a nonsequitur: "None of Ford's cases where the courts evaluated general statutory sanctions reduced the punitive damages award based solely on the [comparable penalty] factor." Opp. 28-29.[7]

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[7] Respondents' remarkable suggestion that awards imposed after the conduct at issue in this case could somehow provide Ford with constitutionally required notice plainly contradicts *BMW*. *See* 517 U.S. at 574 & n.22 (discussing constitutional ban on retroactively applying increased penalty provisions). Likewise, respondents' novel argument that Ford's "failure to recall" the Bronco II constituted a continuing wrong fails because, among other things, it ignores the settled rule that there is no common law duty to recall, *see Restatement (Third) of Torts: Products Liability* § 11 (1998).

Faced with the fact that the single punishment here vastly exceeds Indiana's general statutory fine for criminal recklessness, undisputedly exceeds the combined *total* of all prior punitive damage awards affirmed in Indiana history, and is nearly 100 times the largest award affirmed in Indiana at the time of the conduct at issue, respondents are forced to resort to clever gimmickry, such as artificially inflating the comparable statutory penalty, citing punitive damage awards from *other* jurisdictions, and citing two cases from Indiana that post-date the conduct at issue but predate *BMW*. This approach, which tracks that of the courts below and other courts around the country, if allowed to flourish, will turn the comparable penalty factor into a "guidepost" to nowhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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